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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARSON PIRIE SCOTT & CO.
Petitioner,
v.
WILLIAM M. LACEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress in enacting Title VII responded to a different history of disparate and unequal treatment not present under the Age Discrimination in Employment Act ("ADEA") which prohibits an inference of discrimination to remain in an age discrimination case after a bona fide business justification is raised by the employer.

2. Whether under the Court's McDonnell Douglas-Burdine burden of proof analysis developed under Title VII or the different language and legislative history of the ADEA, a directed verdict is required where the plaintiff's evidence presented fails to contest, meet, demonstrate pretext or rebut the employer's non-discriminatory business reason and fails directly or indirectly to demonstrate intent to discriminate by showing that age was a determining factor in management's decision.

3. Whether, as a matter of law under the ADEA, unlike Title VII, front pay can be awarded by a jury to a discharged employee from the date of trial in a given case until age 70, absent the trial judge first determining whether the equitable remedy of reinstatement is appropriate and if it is not, the duration for which an award of front pay should be allowed.

4. Whether, as a matter of law, mitigation of damages for back pay in an ADEA case, is properly a question for the judge where there is an uncontested record demonstrating that the employee failed to seek employment anywhere before trial.*

* Carson Pirie Scott & Co. is a corporation whose shares are publicly held.

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IN THE
SUPREME COURT OF THE UNITED STATES

CARSON PIRIE SCOTT & CO.

Petitioner,

v.

WILLIAM M. LACEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Carson Pirie Scott & Co. ("Carson") respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Memorandum Opinion and Judgment Order of the United States Court of Appeals for the Third Circuit are unreported and are reprinted in the Appendix hereto at pages A-1 and A-11, respectively. The order denying a timely petition

for rehearing and rehearing en banc is reprinted in the Appendix at page A-13, infra.

The memorandum Order of the United States District Court for the Western District of Pennsylvania (Diamond, J.) is unreported and reprinted in the Appendix hereto at page A-15 to A-20, infra.[1]

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 17, 1987 and a timely petition for rehearing was denied on January 19, 1988. The jurisdiction of this Court to review the judgment of the Third Circuit is invoked pursuant to 28 U.S.C. §1254(1).

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[1]The fact that the challenged Third Circuit decision is unpublished should carry no weight in the Court's decision to review the case. See Commissioner of Internal Revenue v. McCoy, 108 S.Ct. 217, 219 (1987) (court of appeals exceeded jurisdiction regardless of non-publication or lack of precedential effect of a non-published ruling). Petitioner has requested that the instant case be published.

STATUTES INVOLVED

Portions of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., are involved in this case. The pertinent text of these provisions are set out in the Appendix at A-21.

STATEMENT OF THE CASE

This case involves the important question whether, as the Third Circuit has presumed, the policy and practices of discrimination the Congress sought to eradicate in the ADEA are entitled to precisely the same methodology of analysis as established for acts of race, sex and national origin discrimination under Title VII in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 2148 (1981).

1. Under the ADEA, Congress expressly provided, however, that a business justification overcomes any inherent suspicion for which special inferences from the prima facie case can overcome an

employer's unrebutted evidence in the third step of the burden of proof analysis, unlike Title VII. Carson established a record and appealed on this question below. Related issues are also currently pending before the Court from the Third Circuit in the writ of certiorari granted to the employer petition in Harbison-Walker Refractories v. Brieck, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-271), and the petition recently filed in Westinghouse Electric Corp. v. Bhaya, 56 U.S.L.W. 3627 (February 29, 1988) (No. 87-1448).[2]

2. In the present case, the employee

[2]Because of the changes in business and restructuring of this nation's corporations which are presently occurring, the nature of Carson's argument that fundamental differences between Title VII and the ADEA exist, compel the Court's consideration. All ADEA cases are either tried or settled, therefore the issue to be decided in Harbison-Walker v. Brieck will not be dispositive in jury cases and the statutory construction issue was not raised below in Westinghouse Electric Corp. v. Bhaya.

repeatedly could and did not meet the company's performance goals and job instructions set for his territory by Carson, which was the reason for respondent's discharge. The plaintiff's case begins and ends with his own testimony of receiving a company sales plaque as evidence he was a good salesman and that he could sell a lot of flooring; but in his case in chief, he presented no testimony to contest the virtual lack of commercial sales in his Allegheny County territory. The sales plaque he relied upon was given to any Carson salesman selling one million dollars of carpet. Seventy-seven percent of Carson's salesmen have received the plaque (J.A. 376), yet respondent Lacey ranked 26th of 52 salesmen nationwide in 1980 and 21st of 23 salesmen when he was discharged in 1981. (J.A. 755, 858-59).

Lacey, however, submitted no rebuttal

evidence or witnesses to discredit the reasons Carson Executive Vice-President McKinney articulated at trial he considered in deciding to terminate him. Lacey had the opportunity to present evidence that the carpet business was in fact not good in Pittsburgh or that Carson's documentary evidence that Pittsburgh's demographics in relation to its experience in other cities was a pretextual basis for establishing sales goals. He could have tried to show that the demands made on him were unique or that Carson did not terminate salesmen who could not meet the company's sales objectives.

The district court denied a directed verdict to Carson at the close of its case (because no rebuttal was offered), admitting that Carson had "certainly produced" a non-discriminatory reason which satisfied its burden of proof, (J.A. 434), and

admitting all Lacey had was a "bare bones" prima facie case. (J.A. 444). "And, if that is fatal, then the Circuit will have at least this Court's evaluation that, initially, it was bare bones." (J.A. 444). See App. at 3.[3]

3. Petitioner Carson Pirie Scott & Co. ("Carson") employed plaintiff Lacey as a flooring salesman at its Pittsburgh, Pennsylvania office. Lacey was responsible for selling commercial carpet to office buildings and residential carpet products to retail outlets in Allegheny County. During the entire period of plaintiff's employment, the Allegheny County sales district continuously lost money and was lagging behind Carson's expectations for such a large metropolitan area. Sales of resilient flooring was

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[3]Most importantly, Lacey rested after plaintiff's business justification defense--having thus failed to introduce rebuttal evidence at any time during trial.

"J.A." references are to the Joint Appendices filed with the appeal of the case in the United States Court of Appeals for the Third Circuit. "App." references are to the attached appendix of this petition.

twice the amount of carpet sales, yet the historic relationship between carpet and resilient sales should have been a 3:1 ratio in the reverse. (J.A. 352-54, 505). Carson's management made a business decision how to overcome the differential by laying out guidelines for all its salesmen and warning them all up front in 1980 of the consequences if they failed to follow the program. (J.A. 523). Lacey, however, called Carson's goals for him "a joke." (J.A. 205). He also believed that Carson's sales program was not good business. (J.A. 218, 527).

Carson's National Sales Program required that salesmen visit architects, builders and developers for commercial flooring and buyers and store owners for residential flooring. The program relied upon the installation of carpet sample racks in retail stores to provide high visibility to consumers. The sales

program was proven by Carson to increase sales, but it also required that salesmen regularly follow-up with the retail buyers, (J.A. 42-43, 398), and not the floor salesmen. (J.A. 238).[4]

In January 1981, respondent Lacey was sent an "emphatic" letter by National Sales Manager McDonnell to ensure that Carson's National Sales Program would, in fact, be adhered to in all areas with his accounts, which Carson had discovered he had not been doing. (Pl. Ex. 8). McDonnell later found that Lacey's large accounts which had been specifically assigned to him had still not been

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[4]Carson management determined that its problem was three-fold in Allegheny County: Lacey had to place sample racks at all his accounts, regularly call on commercial developers, and spend a substantial amount of his time with buyers at larger department stores (J.A. 529), rather than small store front outlets which was his preference. These reasons were derived from eighteen months of direct field supervision of Lacey which proved unfruitful. (J.A. 537-40).

serviced or contacted for long periods of time, he hadn't placed the number of sales racks in stores as expected, and his volume of commercial sales remained of little consequence even after he was counseled concerning it.

In May 1981, Carson's three Pittsburgh sales managers met with McDonnell and recommended terminating Lacey. McDonnell agreed to review the matter with Carson Executive Vice-President McKinney, who reluctantly made the termination decision on the basis that Lacey had failed to follow management's sales program to make a profit in Pittsburgh when its experience in carpet sales nationwide and national indicators showed otherwise. (J.A. 390).

The evidence also proved that there was a high turnover of salesmen in the Pittsburgh office, which even the Court of appeals obliquely acknowledged "was not

unusual." App. at 3. Lacey was completely unable to present direct evidence that the business reasons upon which McKinney relied were untrue or any direct evidence of a discriminatory intent based on his age.[5]

After his termination in May 1981, plaintiff Lacey never made up a resume (J.A. 180), sought out an employment agency, answered a single job advertisement (J.A. 176), and failed to apply for a single job (J.A. 176). He had been a salesman for 32 years before he began to work for Carson, (J.A. 56) yet he never sought any other position with competitors in the large Pittsburgh flooring market. Prior to August 1, 1981, his job search

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[5]Lacey introduced testimony that five years prior to his discharge, the sales manager at that time had once referred to salesmen in the Pittsburgh office as "over-the-hill." The district court found the statement "so attenuated by subsequent events and circumstances" it did not add to the prima facie case. (J.A. 444).

relied wholly upon talking with his friends and calls to mills in Georgia about availability of jobs with those firms for him in Pittsburgh. (J.A. 181). He had no health or mental conditions precluding his ability to work as a salesman, even at the time of trial (J.A. 57, 92, 180). There was no evidence of wilfulness. (J.A. 419).

After August 1, 1981, Lacey ceased all further efforts. This date coincides with the arrival of his first Social Security check, (J.A. 176-81), for Lacey had applied for Social Security in February 1981, prior to his termination, and received his last paycheck from Carson in July 1981 (J.A. 171).

Carson showed there were jobs locally available in the carpet industry as a Carson employee, discharged three months after Lacey, took a job with Pennsylvania Floor Coverings in Monroeville, PA at the

time Lacey's friends were allegedly telling him jobs were unavailable (J.A. 496).

As a matter of law, the district judge should have first determined that Lacey's half-hearted efforts up to August 1, 1981 did not constitute mitigation and then instructed the jury that, as a matter of law, it could not award either back pay or front pay from August 1, 1981 forward. The jury awarded $353,500.00, the full amount Lacey claimed for five years of back pay and four years of front pay to age 70 during his own testimony, including his own estimated medical and insurance expenses, which were not incurred.

4. On appeal, the Third Circuit ruled that the plaintiff "may meet his burden of proof either in his case in chief or by rebuttal evidence." App. at 6. Carson's argument that it was entitled to a directed verdict since Lacey failed

to proffer any evidence why his discharge was pretextual or a determinative factor in his discharge was rejected, because the Third Circuit had recently ruled that this is not a requirement for reaching a jury in an age case. Bhaya v. Westinghouse Electric Co., 832 F.2d 258 (3d Cir. 1987), cert. filed, No. 87-1448 (Feb. 29, 1988).[6] Here, the court of appeals held that it is sufficient,

> if his case in chief, included evidence sufficient to justify the jury in not accepting defendant's contentions. There is simply no requirement that a plaintiff bifurcate a case under the ADEA, although he may desire to do so.

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[6]In Bhaya, 832 F.2d at 216, the Third Circuit determined that the prima facie inference of discrimination permeates an Age case:

> The plaintiffs' evidence was adequate to support an inference, initially a presumption of discrimination. When the defendant produced evidence of a nondiscriminatory reason, the presumption dropped from the case. A permissible inference remained, however, to create an issue of fact. (emphasis in original)

Thus, because the district judge initially decided that plaintiff did establish a "bare bones" prima facie case at the end of his case in chief (J.A. 444), this was sufficient to create an issue of fact for the jury to decide by drawing "reasonable inferences from the evidence." App. at 6.

The court of appeals also took explicit exception to petitioner's legal question that the jury could be allowed to enter a verdict for future loss of earnings in the case, without the trial judge making the initial determination that reinstatement was not possible and simply leaving it to the jury to decide whether or not to award an amount. Consequently, it rejected the logic of the recent Second Circuit decision in Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987), which "rejected our contrary precedent in Maxfield [v.

Sinclair International, 766 F.2d 788 (3rd Cir. 1985)]. Of course, we do not." App. at 8.

The court of appeals also rejected Carson's argument that the plain facts demonstrate Lacey's complete failure in his duty to mitigate damages and thus is barred from recovery, because "[t]he jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings." App. at 7.

The questions presented from these facts raise serious issues concerning the burden of proof in ADEA cases, as well as an express disagreement in the circuit courts of appeal on the related, but equally important authority of a federal court to award front pay, and what minimum efforts legally qualify as attempts to mitigate damages.

REASONS FOR GRANTING THE WRIT

Consistent with the legislative

history of the ADEA and because the ADEA specifically provides that production of a justifiable business reason bars the finding of a violation, the employee must produce affirmative evidence that the business reason is untrue or that age played a determinative role in his discharge. Each circuit has considered cases arising under the ADEA in this special manner. Since Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), however, the Third Circuit has developed a body of law greatly expanding employer liability at odds with the statute's intent. According to the Third Circuit, all prima facie cases reach the jury because the jury can disbelieve the witnesses.

This Court recently granted the petition for writ of certiorari in Harbison-Walker Refractories v. Brieck, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-

271), to consider the correctness of the Third Circuit's test as applied to summary judgments. However, that circuit has also set itself expressly in conflict with the equally important legal question that the equitable exercise of awarding front pay, as followed in other Circuits, is reserved for the court, not a jury. Even if petitioner is correct on its first question, the front pay question will not be decided in Brieck and it has not otherwise been questioned under Title VII because there is no right to a jury trial in those cases.

The case at bar embodies these legal conflicts in a set of clear facts typical of any discharge by an employer where the employee is not doing his job and the case reaches the jury. Without clarification by this Court of the important legal issues presented in this case and arising under the ADEA necessary to ensure

uniformity of law in the lower federal courts, Congress could be caused to reconsider the legislation.

I.

THE DECISION OF THE THIRD CIRCUIT CREATES A CLEAR BREAK WITH THIS COURT'S LIBERTY LOBBY AND BURDINE BURDEN OF PROOF DECISIONS THAT WILL PRECIPITATE CONSIDERABLE JURY LITIGATION UNDER THE ADEA TO SECOND GUESS AN EMPLOYER'S EMPLOYMENT DECISIONS

A. THE DECISION BELOW DEPARTS FROM THE EVIDENTIARY BURDEN ESTABLISHED FOR THE PLAINTIFF AT THE CONCLUSION OF THE EMPLOYER'S PRODUCTION OF A BUSINESS REASON UNDER THE ADEA

The court of appeals gave short shrift to this case because it believed the inference of discrimination decided in Bhaya v. Westinghouse Electric Corp., 832 F.2d 258 (3d Cir. 1987), cert. filed, 56 U.S.L.W. 3627 (February 29, 1988)(No. 87-1448), five weeks earlier, was controlling. In Bhaya, the Third Circuit determined first, that an inference of discrimination from the prima facie case is not dispelled by the introduction of a

legitimate employer business reason, and second, that a jury can infer discrimination from the prima facie case and thereby credit or discredit witness testimony "where the only evidence of intent is oral testimony." Bhaya, 832 F.2d at 262.

Given the nature of age discrimination, there must be some independent evidence to refute the employer's business rationale; the employee's testimony that he is a good worker cannot alone be enough to establish a case of discrimination. The employee must be required to create an issue of fact out of the employer's reasons, especially since the ADEA provides that it is a lawful business practice for an employer to discharge an employee for "good cause", 29 U.S.C. §623(f)(3), and based on "reasonable factors other than age." 29 U.S.C. §623(f)(1).

The Third Circuit, however, has

determined it permissible for the jury to second guess an employer's business judgment as, in its view, the jury is entitled to draw reasonable inferences from the evidence "notwithstanding that an opposing party has presented direct contrary evidence." App. at 6-7[7]. Just being in the protected class, the Third Circuit suggests, is enough to allow argument ~~to~~ a jury that the employee's witnesses should not be credited. The district judge, however, verbalized the

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[7]This court granted certiorari to test the Third Circuit's standard in a parallel decision involving summary judgment cases. The question presented in Harbison-Walker Refractories v. Brieck, 624 F.Supp. 363 (W.D. Pa. 1985), rev'd mem., 822 F.2d 52 (3d Cir. 1987), cert. granted, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-271), is whether a plaintiff who alleges intentional age discrimination can survive summary judgment merely by questioning the employer's business judgment without presenting direct or indirect evidence that the judgment in fact was motivated by intent to discriminate. The case at bar is ripe to consider the corollary of the Burdine test in ADEA cases reaching a jury.

lack of direction being experienced in the trial courts concerning this issue when he exclaimed that since all that has been presented is a "bare bones" case, if that "is fatal, then the Circuit will have at least this Court's evaluation...." (J.A. 444).

The requirement that the plaintiff produce affirmative evidence of age discrimination is consistent with the Court's recent explication in Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514 (1986), a case also discussing directed verdict standards, that "'discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion.' Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." (emphasis added). "The mere scintilla of evidence in support of the plaintiff's position will be insuffi-

cient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict based upon evidence that the employer's reason is untrue." 106 S.Ct. at 2512.

To meet his burden to prove a case of intentional age discrimination, a plaintiff must prove pretext through a preponderance of the evidence by specifically showing or at least contesting that the underlying facts of the employer's explanation are a cover for discrimination. Irvin v. Arco Carbide, 837 F.2d 724, 726 (6th Cir. 1987) ("disputation of the business reason...is not sufficient to carry the burden"); Elliot v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983) (burden "not dis-

charged by general avowals of belief, however sincere, that age--rather than an established adequate reason--was the real reason for the termination"), cert denied, 467 U.S. 1215 (1984). Therefore, a plaintiff "cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason." Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987).

Because a violation is not established by testimony showing an unwise business decision, ill will or even arbitrary action, the circuit courts of appeal have required that age be the "determining factor" in the discharge. Gray v. New England Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409 (7th Cir. 1984); Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1316 (9th Cir. 1982), cert denied,

459 U.S. 859 (1982). The Seventh Circuit explained in Bechold v. IGW Systems, Inc., 817 F.2d 1282, 1285 (7th Cir. 1987), that the employee's burden is to show the employer's reason had no basis in fact, did not actually motivate his discharge or that the reasons were insufficient to motivate a discharge. This requirement has been consistently adhered to in all circuits, but the Third.

B. THE DECISION BELOW CONTRAVENES THE ADEA BY ALLOWING A CASE TO REACH A JURY SOLELY ON A PRESUMPTION OF DISCRIMINATION WHICH CONTRAVENES THIS COURT'S STANDARDS EVEN UNDER TITLE VII

The logic of this evidentiary progression set out above is consistent with Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), where this Court analyzed the legal standards for evaluating the shifting burdens of proof in cases arising under Title VII. The Court affirmed in

both cases that the evidentiary burden of persuasion never shifts to the employer, even though decisions based on race, sex or national origin are invidious in nature and may initially entitle a plaintiff to a presumption of discrimination. Once the plaintiff asserts a prima facie case, however, only the burden of production shifts to the employer to articulate a nondiscriminatory reason for discharge.

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,[10] and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Burdine, 450 U.S. at 256-57 (emphasis added).

In footnote 10 of Burdine, the Court explained that "[a] satisfactory explanation by the defendant destroys the legally

mandatory inference of discrimination arising from the plaintiff's initial evidence." In Furnco 438 U.S. at 578, the Court specifically states: "[t]o dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate non-discriminatory reason for the employee's rejection.'" (emphasis in original).[8] But in Bhaya, 832 F.2d at 262-63, the Third Circuit propounded that the "jury can infer" discrimination from the prima facie case and therefore these inferences "together with testimony..." rebut the proffered explanation by the defendant without proving age was a

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[8]In this case, the court of appeals does not contend that respondent Lacey discredited Carson's explanation through effective cross-examination of its witnesses or that Lacey presented any evidence he was treated differently from any other Carson employees. Neither did it suggest that having done so, combined with a particularly compelling case, he met the ultimate burden of proof.

motivating factor or establishing what fixed characteristic of age allows a presumption of invidiousness, which may be proper for decisions based on race, sex, or national origin.

In Burdine, because it "would require the defendant to introduce evidence, which, in the absence of any evidence of pretext, would persuade the trier of fact that the employment action was lawful, this Court found the Fifth Circuit erred. This exceeds what properly can be demanded to satisfy a burden of production." 450 U.S. at 257 (emphasis in original).[9]

Consistent with this Court's view that affirmative evidence directed at the employer's explanation is required, the Court was able to explain that due to the

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[9]Moreover, once the presumption of the prima facie case is dispelled by defendant, evidence of a pretextual reason for discharge does not revive that presumption. Sims v. Cleland, 813 F.2d 790, 793 (6th Cir. 1987).

employer's natural incentive to persuade the jury and the employee's opportunity for discovery under the Federal Rules of Civil Procedure, including any EEOC file, "we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." Burdine, 450 U.S. at 258 (emphasis added). The reasoning of the Third Circuit that a jury verdict should be allowed to stand because a jury might disbelieve the employer's explanation creates a clear conflict with the Anderson requirement that a party opposing a motion for summary judgment, directed verdict (or motion for j.n.o.v.) come forward with affirmative evidence in support of his position that disclaims the employer's justification.

At bar, Lacey never disproved that his sales performance was sufficient for Carson's business or that he aggressively

pushed Carson's national sales program.[10] The reasoning that there continues a "permissible inference" of discrimination which can substitute for a factual submission of pretext evidence is at odds with the "determinative factor" test and Burdine. An ADEA case cannot be decided on prima facie facts standing unconnected to direct or indirect evidence of pretext which the Third Circuit in Bhaya approved and which has no legal support.

II

THE DECISION BELOW ERRONEOUSLY CREATED PERMISSIBLE INFERENCES TO ARISE UNDER THE ADEA AND TITLE VII IN A LIKE MANNER WHEN THE LEGISLATIVE HISTORY OF THE DISCRIMINATION INTENDED TO BE ELIMINATED WERE DETERMINED BY CONGRESS TO BE DISSIMILAR

Since Congress statutorily affirmed

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[10]The instant case grows out of a line of cases by which the Third Circuit, before and since Anderson v. Liberty Lobby, has permitted an ADEA plaintiff to prevail by means of indirect proof. Chipollini v. Spencer Gifts, Inc. 814 F.2d 893, 898 (3d Cir. 1987); Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 205 (3d Cir. 1987); Grahm v. F.B. Leopold Co., Inc., 779 F.2d 170 (3d Cir. 1985).

that employers are not prohibited from differentiating between workers "based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), the plaintiff must direct his case to disproving those factors with evidence. Plaintiff Lacey's failure to rebut Carson's evidence that he was discharged for not meeting Carson's critical need for greater sales in Allegheny County, failed to meet his required burden of proof, thereby entitling Carson to a directed verdict.

The Third Circuit's view, however, is that a jury is entitled to decide that an employer acted on the basis of age because the absence of evidence "directly impugning the nondiscriminatory reason'" is unnecessary inasmuch as "indirect evidence, if credited, raises an inference of discrimination" that allows a jury to discredit the testimony. Bhaya, 832 F.2d 258, 262 (3d Cir. 1987), or that the

employer could, perhaps, have made a different business decision.[11] Yet, in Burdine, 450 U.S. at 259, the Court stated that the ADEA "was not intended to 'diminish traditional management prerogatives,'" (quoting United Steelworkers of America v. Weber, 443 U.S. 193, 207 (1979))

A strong presumption or suspicion of invidious discrimination is not justified in an ADEA case and therefore the courts should not evaluate a claim of pretext in precisely the same manner as Title VII. In Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (citations omitted), the Court noted that,

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[11] In Bhaya, 832 F.2d at 262, the court of appeals credited the plaintiff's expert's testimony that bargaining unit work was not "as readily" transferred to other employees than it could have been to the plaintiffs. The suggestion that alternative actions could have been chosen challenges the employer's business judgment which is not allowed under the ADEA, but may be under Title VII.

> [W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities... . [O]ld age does not define a "discrete and insular" group, in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span.

See also Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977), Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (no automatic presumptions whenever a worker is replaced by another of a different age). This is also simply inferred from the purpose expressed by Congress in §1 of the statute, 29 U.S.C. §621.

Circuit Judge Arlin Adams particularly explained in dissent in Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1401 (3d Cir. 1984), how the weaker

presumption of bias in age cases exists relative to race or sex discrimination cases. When an employer's decision is based on performance, "the claimant's rebuttal evidence of pretext should be evaluated with greater care than in a Title VII action. Our intuitive understanding of bigotry supports an inference of pretext from virtually any defect in an employer's explanation of a decision to disfavor a member of a Title VII protected class. I do not think we should be as quick to infer pretext in an ADEA proceeding." [12]

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[12] In Duffy and other similar cases where evidence of pretext is proffered, each case has independent direct evidence of discriminatory intent. In Duffy, company personnel testified at variance and a discriminatory remark "we are looking for younger men" was made. In Grahm v. F.B. Leopold Co., Inc., 779 F.2d 170 (3d Cir. 1985), the plaintiff was told he was "dog meat." These distinguishing facts of animus are not present here. Without such direct evidence to bolster a prima facie case, a plaintiff cannot establish pretext from the prima facie case alone.

The ADEA is clearly a hybrid statute reflecting Congress' desire to eliminate employment practices similar to those prohibited in Title VII. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). Unlike Title VII, however, the enforcement mechanisms of the ADEA are found in the Fair Labor Standards Act, revealing significant differences in remedial and procedural provisions of the two statutes. Lorillard v. Pons, 434 U.S. 573, 584 (1978); 29 U.S.C. §626(b). In addition, the ADEA expressly provides for good faith defense of reliance on agency interpretations and business reasons. 29 U.S.C. §§626 (e)(1)(f)(1). Accordingly, there is a distinction in the different approaches Congress chose in the two acts between the immutable characteristics of race, sex and national origin which might lead to invidious discrimination and discrimination based on relative age differentials

that the ADEA seeks to overcome. See Laugesen v. Anaconda Co., 510 F.2d 307, 312 n. 4 (6th Cir. 1975).

Furthermore, the court itself has been careful to recognize the distinction between the presumptions underlying the ADEA and has questioned applying the evidentiary burdens wholesale from Title VII. "[I]n enacting the ADEA Congress exhibited both a detailed knowledge of the FLSA provisions and their willingness to depart from those provisions regarded as undesirable for incorporation." Lorillard, 474 U.S. at 581; TWA, Inc. v. Thurston, 469 U.S. 111, 125 (1985) ("Congress declined to incorporate several FLSA sections" such as criminal provisions and changed the standard for liquidated damages). Rather, Congress chose to place the ADEA under the standards for relief of the Fair Labor Standards Act.

By enacting the ADEA, Congress did

not authorize juries to substitute their view of how a business should be run. Furnco, 438 U.S. at 577-78. An employer is entitled to make both good and poor employment decisions and the jury is not to sit as a "super-personnel department" to oversee personnel decisions. Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986), cert. denied, 107 S.Ct. 959 (1987). A business must be allowed to terminate marginal employees, especially when the business is unprofitable. In the case at bar, there is no testimony that "the legitimate reasons offered by defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253.

Accordingly, in evaluating whether evidence exists which is legally sufficient to show a pretext for discrimination, there can be no remaining inferences of discrimination after an employer has

produced a nondiscriminatory business reason for its action. The nature of the ADEA plaintiff's evidence must counter the correctness of the specific evidence introduced by the employer to show it is untrue and lacks a "factual basis." Burdine, 450 U.S. at 258.

As Judge Adams prophesied in Grahm v. F.B. Leopold Co., 779 F.2d 170, 175 (3d Cir. 1985), "[i]f courts strain to find snippets of evidence to support highly questionable inferences of discriminatory conduct they not only will unduly hobble necessary restructuring by hard-pressed industries, but eventually cause Congress to reconsider the controlling legislation." The panel's unexplained switch in the burden of proof and wholesale importation of Title VII law in ADEA cases under the guise of allowing permissible jury inferences from the evidence, requires the court to grant this petition to secure

uniformity of decisions in at least the Third Circuit and to settle the matter of proofs in the remaining circuits.[13]

III

THE THIRD CIRCUIT ESTABLISHED A CLEAR CONFLICT WITH THE SECOND CIRCUIT DECISION IN DOMINIC V. CONSOLIDATED EDISON THAT 1) A JURY CAN DECIDE WHETHER OR NOT TO AWARD FRONT PAY AND 2) TO AWARD FRONT PAY FOR AN INDETERMINATE PERIOD OF TIME. BOTH ACTIONS THE SECOND CIRCUIT CORRECTLY DETERMINED ARE DECISIONS RESERVED FOR THE EQUITY JURISDICTION OF THE DISTRICT JUDGE.

The trial judge failed to determine that Lacey could not be reinstated as a carpet salesman by Carson prior to allowing all issues of front pay to be

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[13]The growth rate in cases under the ADEA is reflected in the burgeoning caseload of the district courts. In 1983, there were 4,981 labor cases in litigation excluding matters under the FLSA, LMRA, LMRDA and RLA. In 1987 there were 7,452 cases comprising this category. Table C-2A, U.S. District Courts Civil Cases, June 30, 1983 thru 1987, Annual Report of the Director of the Administrative Office of the U.S. Courts, Appendix 2 at §3 (June 30, 1987). A 3.7% increase is reported for 1986-87 in this "other labor" area and a 4.5% increase in FLSA litigation for the same period.

decided by the jury. The procedure followed in this case and affirmed by the Third Circuit is directly contrary to the decision of the Second Circuit in Dominic v. Consolidated Edison Co., 822 F.2d 1249 (2d Cir. 1987).

In Dominic, the Second Circuit determined that the "decision whether to award front pay in lieu of reinstatement is an equitable one entrusted to the trial judge" as well as the size of an award. Dominic, 822 F.2d at 1257. The nature of this approach follows from the ADEA itself, since 29 U.S.C. §626(c)(2) provides for trial by jury "of any issue of fact in any such action for recovery of amounts owing as a result of a violation, regardless of whether equitable relief is sought by any party in such action." "Amounts owing" then, do not relate to "issues concerning equitable relief [and] are not to be tried by a jury." Id.

The Second Circuit determined that this interpretation of the FLSA also flows from the legislative history of the Act since the House Conference Report identifies "amounts owing" as "items of pecuniary loss such as wages, firing, and other job-related benefits" and liquidated damages. H.R. Conf. Rep. No. 950, 95th Cong. 2d Sess. at 13-14, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 528, 535.

> The inference to be drawn from this legislative history is that Congress' intention was simply to comply with the seventh amendment by providing a jury trial of factual issues underlying such claims. There is no evidence that Congress intended to depart from the traditional distinction between legal and equitable claims embodied in the seventh amendment.

822 F.2d at 1257.

That interpretation is consistent with this Court's previous decisions in TWA v. Thurston 469 U.S. 111, 125 (1985), where the Court determined that the

remedial provisions of the ADEA and the FLSA "are not identical" and in Lorillard v. Pons, 434 U.S. 575, 583, 584 (1978), where the Court concluded two sharp distinctions between the enforcement and remedial schemes in contrast with Title VII. The Court did, however, make it clear that the "word 'legal' is a term of art" and the availability of "legal or equitable relief" under 29 U.S.C. §626(b), was as its normal meaning, meant by Congress "to refer to judgments enforcing....liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." Lorillard, 434 U.S. 583 n. 11. These items of recovery were to be "treated as actions for lost wages under the ADEA" the same as unpaid minimum wages and overtime are treated under the FLSA, Lorillard, 434 U.S. at 582.[14] Therefore,

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[14]The courts first developed front pay in Title VII as a remedy due to the (continued...)

jury trials were intended under the ADEA, but not under Title VII and back pay is a matter of equity under Title VII, but legal relief to be awarded under the ADEA. Id.

In fact, "[t]he vast majority of older workers who lose their jobs find new employment within a few months--many within a few weeks..." Report of the Secretary of Labor to Congress, The Older American Worker, at 81 (1965). Consequently, any presumption that front pay was to be a mandatory element of legal relief has no basis in the legislative history of the ADEA.

Other circuits, like the Second Circuit, have reserved front pay for the

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14(...continued)
invidious nature of race, sex or national origin discrimination, but to be awarded by a judge. The Third Circuit imported the front pay relief from Title VII to the ADEA without controlling its speculative nature through the trial judge's equitable exercise of discretion.

discretion of the trial judge holding that it is equitable relief. Castle v. Sangamo Weston Inc., 837 F.2d 1550, 1562 (11th Cir. 1988). "In deciding whether front pay is appropriate, we have noted that the district court in its discretion should consider the circumstances in each particular case, and should note such factors as whether: the plaintiff has a reasonable prospect of obtaining comparable employment; the time period for the award of front pay is relatively short; and whether liquidated damages have been awarded (and if so, in what amount)." Coston v. Plitt Theatres, 831 F.2d 1321, 1332 (7th Cir. 1987); Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985).

The Third Circuit in the present case has refused to accept these controls on front pay awards. Rather, it cited Maxfield v. Sinclair International, 766

F.2d 788 (3d Cir. 1985), for the proposition that "the court in the circumstances here could allow the jury to return a verdict for loss of future earnings instead of requiring reinstatement, provided the jury found, as it did, that plaintiff suffered such a loss and defendant was liable to him" and the court of appeals held that "there is no question but that in this circuit under Maxfield v. Sinclair International the court in the circumstances could allow the jury to return a verdict for loss of future earnings instead of requiring reinstatement..." App. at 7-8.[15] In Maxfield, the

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[15]The trial judge in this case instructed the jury that it must award front pay if it determined that Lacey was discharged because of his age: "This consists of wages and certain employee benefits Plaintiff would have received from the date the Defendant discharged him to the date of this trial and future wages to age 70 (J.A. 473).... The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the adverse

(continued...)

court bluntly held, "[o]f course the amount of damages awardable as front pay is a jury question," 766 F.2d at 796. No authority is given by the Maxfield court for this holding. The majority view is the better reasoned one.

Preserving this statutory distinction explained in Dominic, will serve as an important control over awards and ensure that the ADEA does not become a retirement plan of its own.[16] The monetary liability

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[15](...continued)
action, the date of the firing, to the date up to age 70." (J.A. 471) The judge made no preliminary decision that Lacey could not have been reinstated.

[16]In Dominic, plaintiff immediately acquired a new job, but at less pay. The trial court found that "an award of front pay that assumes that Dominic will stay in his present lower paying job and award him compensation for the difference between that job and what he would have earned at Con Ed until he reaches the age of 70 is highly speculative." 44 F.E.P. Cases 1865, 1869 (S.D.N.Y. 1986). Therefore, even though Con Ed failed to show that Dominic had not mitigated his damages, the failure "does not entitle him to lifetime front-pay award." 822 F.2d at 1258. "In
(continued...)

of front pay to employers, without control or court supervision, is so substantial under the ADEA that it warrants plenary review by this court.

Moreover, front pay is so highly speculative because the trial takes place at a fixed point in time where only the prior efforts of the plaintiff can be reviewed. This is a further reason why the award of front pay is not a jury question as there are no hard facts to be resolved in its deliberations. The situation is exacerbated by the enormous amount of ADEA litigation now pending in the federal courts.

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[16](...continued)
calculating the size of a front-pay award the court must estimate the plaintiff's ability to mitigate damages in the future." Id. Two years, not 18 years, was determined by the trial court to be sufficient.

IV

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT THAT THE DUTY TO MITIGATE DAMAGES REQUIRES REGULAR EFFORTS TO SEEK WORK AND APPLY FOR EMPLOYMENT PRIOR TO TRIAL WHICH ARE NOT MET IF A PLAINTIFF DOES NOT APPLY FOR A SINGLE JOB OR SEEK EMPLOYMENT ASSISTANCE

The rule requiring the mitigation of damages was eliminated in this case. It is the affirmative duty, as a matter of law, of an injured plaintiff to minimize his loss by seeking further employment. Even if he does not find suitable other employment, if he could have, his damages will be reduced as if he had. Thus, the issue of mitigation cannot be submitted to the jury in sham or deminimus cases where the plaintiff drops all efforts to seek work after two months (when his severance pay ended), but five years before trial.[17]

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[17] This case does not call into question whether Lacey could have been excused from seeking work because of poor economic conditions, because he did not

(continued...)

The uninterrupted policy of this court in remedying employment discrimination has been to resolve cases in favor of the "healthy policy of promoting production and employment", rather than through windfalls. Phelps Dodge Corp. v. NLRB 313 U.S. 177, 200 (1941). The failure of a discharged employee to make a reasonable search for interim employment constitutes an affirmative defense to back pay. NLRB v. Nickey Chevrolet, 493 F.2d 103 (7th Cir. 1974). The rule is fully supported by the Congressional statement of findings and purpose for the ADEA "to promote employment of older persons" and "to help employees and workers find ways of meeting problems arising from the impact of age on employment", 29 U.S.C. §621(b), "and especially to regain employment when

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17(...continued)
present such evidence. If he had, the speculative nature of projecting the front pay award would be even more closely focused due to lower commissions.

displaced from jobs." 29 U.S.C. §621(a)(1).

The decision concerning respondent William Lacey's mitigation efforts and other discharged employees emerging in the Third Circuit runs against the body of law well-established by this Court and in other circuits, namely, "whether public policy is best served by encouraging a skilled and healthy worker to remain idly unemployed for [nine years], or by encouraging him to obtain a job, comparable to his regular job in working conditions and wages, for the duration of the [] period." NLRB v. Madison Courier, Inc., 505 F.2d 391, 395 (D.C. Cir. 1974).

In Madison Courier, the court of appeals reviewed a situation where striking printers were seeking entitlement to back pay. None of the workers had accepted interim employment or comparable jobs outside the industry, registered with

the state employment agency, or made an individual application for other employment in the industry. Rather, the strikers relied on the union "grapevine" for jobs. The court of appeals held these efforts were not diligent and barred an award of back pay.

In the Title VII context, this court approved the corollary to the mitigation rule that after a reasonable period of time, the duty of mitigation requires an employee to accept employment even at a lower rate of pay if one equivalent to the former is unavailable. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n. 16 (1982); Madison Courier, 505 F.2d at 395 (he must "lower his sights"). This affirmative duty to be available for employment and to seek new employment is the rule in other circuits and is well reasoned. NLRB v. Southern Silk Mills, Inc., 242 F.2d 697 (6th Cir. 1956); cert denied, 355 U.S. 821

(1957); NLRB v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955). See Restatement (Second) of Contracts §347 (1981).

William Lacey testified he ceased all efforts to obtain work after he began to receive Social Security in 1981 (J.A. 176-81). Carson demonstrated at trial that jobs in the carpet industry were locally available which proved that Lacey's "losses [were] willfully incurred" and "clearly [an] unjustifiable refusal to take desirable new employment." Phelps Dodge, 313 U.S. at 198, 200. A complete failure to look for work cannot, as a matter of law, be a "reasonable search" or "honest good faith efforts" to NLRB v. Cushman Auto, 223 F.2d 832, 836 (1st Cir. 1955); Nickey Chevrolet, 493 F.2d at 108.

Moreover, Lacey's failure to even register with the State Employment Agency (J.A. 176, 180) should have been a showing of lack of reasonable diligence. Madison

Courier, supra; Burns & Sims, Inc., 157 N.L.R.B. 366, ent'd, 383 F.2d 987 (5th Cir. 1966). Accordingly, an absolute failure to continue to search for alternate employment, must be, as a matter of law, a failure to exercise the duty to mitigate damages which the trial court is obliged to determine. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

The court of appeals in the present case created a conflict in the circuits by its failure to apply a reasonable judicial check on the sufficiency of the mitigation evidence as "[t]he jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings." App. at 7. Yet, the uncontested testimony of respondent Lacey himself, as the court of appeals was well aware, was that he ceased all efforts to look for work the moment he received his first social security check and his severance

pay ended. To affirm a nine year award of front pay on what are, frankly, two months of meager employment inquiries, risks turning the remedial foundation of the ADEA into an early retirement act rather than a mechanism to "promote employment of older workers".

The Third Circuit view is also out of step with the decision in Anderson v. Liberty Lobby that the trial court in deciding whether or not to grant a directed verdict must, in fact, inquire whether there was a preponderance of evidence to support a verdict. 106 S.Ct. at 2512. The Third Circuit's utterly lax standard of review is clearly out of step with any principled application of the rule of mitigation. The decision erodes this Court's caselaw and thereby invites its correction.

CONCLUSION

The legislative history and language of the ADEA, as shown by Judge Adams in Duffy, demonstrate that permissible inferences of invidious discrimination which arise under Title VII do not similarly pervade an age case. To permit the court of appeals decision to stand will leave no room for preventing an employer's business decisions from coming under a jury's "second guess" evaluation as to its propriety, which Congress expressly chose not to allow. For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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April 18, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3202

WILLIAM M. LACEY, an Indiv.

v.

CARSON-PIRIE SCOTT & CO., a corp.,

Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
Civil Action No. 83-772
District Judge: Honorable Gustave Diamond

Submitted Pursuant to Third Circuit Rule 12(6)
December 10, 1987

BEFORE: GREENBERG and SCIRICA, Circuit Judges, and POLLAK,* District Judge

(Filed December 17, 1987)

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

Plaintiff, William M. Lacey, brought this action against defendant, Carson-Pirie-Scott & Co., his former employer,

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

for wrongful termination, breach of an employment contract, diversion of sales commissions and violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 261, et seq. All of plaintiff's claims for relief were dismissed either before or at trial except for the claim under the ADEA which was submitted to the jury. Plaintiff recovered a verdict for $353,500, the full recovery he sought. Following the denial of defendant's motions for a new trial or a judgment n.o.v., it appealed.

Plaintiff, who was employed by defendant as a floor covering sales person in the Pittsburgh area, was terminated by defendant in May 1981 when he was 62 years old, allegedly because of his poor selling performance. On plaintiff's direct case he presented evidence that on occasion he had exceeded his sales quota and had received an award from defendant in

recognition of his efforts. Plaintiff was permitted to testify on damages as to his anticipated earnings through 1988, when he apparently intended to retire. Plaintiff also testified that he attempted to mitigate damages but was unable to do so.

Defendant presented evidence that plaintiff's age was never considered when it discharged him. It further attempted to prove that it frequently discharged employees, plaintiff's performance was poor and the procedure by which he was discharged was not unusual.

When defendant rested, the district judge asked plaintiff if he had rebuttal and received a negative answer. Defendant then moved for a directed verdict but was unsuccessful as the judge thought plaintiff had put in a prima facie "bare bones" case.

During the jury's deliberations, it sent a note to the judge asking when

defendant found out plaintiff's actual age, a question no doubt generated by the fact that plaintiff had misrepresented his age to defendant in his application for employment. Subsequently, the jury returned a verdict for the "full amount of settlement." The court then instructed the jury that if it intended to award money damages it had to do so with a dollar amount. The verdict for $353,500 was later delivered.

On this appeal defendant argues that it is entitled to a reversal because plaintiff failed to present rebuttal evidence and thus failed to establish that defendant's proffered reasons for his discharge were pretextual, plaintiff was not entitled to an inference that defendant's reasons for discharging him were pretextual, plaintiff failed to mitigate damages and the verdict improperly reflected speculation by the jury regard-

ing future lost earnings. Defendant further asserts that plaintiff's claim of entitlement to future lost earnings was an issue for the court.[1] Finally, defendant asserts that the jury was confused and disregarded the weight of the evidence.

This court recently reviewed the procedures for an action under the ADEA in Bhaya v. Westinghouse Electric Corporation, No. 87-1026, (3d Cir. Nov. 2, 1987), and we repeat them here. A plaintiff may recover only if he proves by a preponderance of the evidence that age was a determining factor in his termination and he may do this by direct or circumstantial evidence. If a plaintiff in his case meets this burden, the defendant, to avoid a motion for a directed verdict, must articulate and support by evidence a

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[1]Defendant does not assert that it asked for and was refused a charge discounting future earnings to current value.

legitimate, nondiscriminatory reason for its action. If the defendant does this, the plaintiff then has the burden to prove discriminatory animus in the defendant's actions, thus overcoming the defendant's claim of justification. The plaintiff, however, may meet his burden either in his case in chief or by rebuttal evidence.

It is apparent from the application of the principles restated in Bhaya that defendant's first two points are without merit. Plaintiff was not required to present rebuttal evidence if his case in chief included evidence sufficient to justify the jury in not accepting defendant's contentions. There is simply no requirement that a plaintiff bifurcate a case under the ADEA, although he may desire to do so. Further, in an ADEA case, as in any lawsuit, a jury is entitled to draw reasonable inferences from the evidence notwithstanding the fact

that an opposing party has presented direct contrary evidence.

We see no merit to defendant's contention that plaintiff failed to mitigate damages and thus is barred from relief for there was evidence that plaintiff attempted to find other employment but was unsuccessful. The jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings. See Maxfield v. Sinclair International, 766 F.2d 788, 795-96 (3d Cir. 1985), cert. denied, 106 S. Ct. 796 (1986). Further, there is no question but that in this circuit under Maxfield v. Sinclair International the court in the circumstances here could allow the jury to return a verdict for loss of future earnings instead of requiring reinstatement, provided the jury found, as it did, that plaintiff suffered such a loss and defendant was liable to

him. While defendant cites Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987), for the proposition that such an award is within the discretion of the court, it acknowledges that the Dominic court rejected our contrary precedent in Maxfield. Of course, we do not.

In addition, there is no basis to order a new trial because of jury confusion. While defendant suggests the jury may have awarded a verdict to plaintiff because defendant discharged him for misstating his age to defendant, it is no less likely that the jury may have considered the time of defendant's knowledge of plaintiff's age to be germane because it gave defendant a reason, albeit an unlawful one, to terminate plaintiff. Further, the attempt to return a verdict for the full amount of the settlement was undoubtedly, as the trial judge thought

was likely, merely an indication that the jury accepted plaintiff's figures in their entirety.

In view of the aforesaid, the judgment entered on the jury verdict on August 21, 1986 and the order of March 11, 1987 denying defendant's motions for a new trial and judgment n.o.v. will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3202

WILLIAM M. LACEY, an Indiv.

v.

CARSON-PIRIE SCOTT & CO., a corp.,

Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
Civil Action No. 83-772
District Judge: Honorable Gustave Diamond

BEFORE: GREENBERG and SCIRICA, Circuit Judges, and POLLAK,* District Judge

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania, and was submitted under Third Circuit Rule 12(6) on December 10, 1987.

On consideration whereof, it is now

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

here ordered and adjudged by this court that the judgment of the District Court entered on August 21, 1986, and the order on defendant's motions for a new trial and judgment n.o.v. entered on March 11, 1987, be and the same are hereby affirmed.

Costs shall be taxed against appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: December 17, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3202

WILLIAM M. LACEY, an Indiv.

v.

CARSON-PIRIE SCOTT & CO., a corp.,

Appellant

D.C. Civ. No. 83-772

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, and POLLAK,* District Judge

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Morton I. Greenberg
Circuit Judge

Dated: January 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM M. LACEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-772
CARSON PIRIE SCOTT & CO.,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

AND NOW, this 11th day of March, 1987, defendant having filed a motion for new trial pursuant to Fed.R.Civ.P. 59(a) and a motion of judgment n.o.v. pursuant to Fed.R.Civ.P. 50(b), plaintiff having responded to said motions, and the court having given the matter due consideration, IT IS ORDERED that said motions be, and the same hereby are, denied for the following reasons.

1) Defendant maintains that the verdict was excessive because the court improperly permitted the plaintiff to testify regarding future increases in salary, commission or benefits. Specifi-

cally, the defendant, citing Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982), argues that salary increases may be recovered under the ADEA only if the likelihood of such patterns of increases, or similar evidence. Id. at 873. (emphasis added). However, in the case at bar, the evidence in fact was that over a seven year period the company systematically increased plaintiff's sales quota by 9% and that the plaintiff met or exceeded the 9% increase in each year, and that this resulted in proportionate increases in plaintiff's earnings. There was, therefore, sufficient evidence of patterns of past increases in increases to obviate the need for expert testimony regarding future increases in salary.

2) The defendant further contends that the verdict was excessive because the court erred when it refused to instruct the jury that no amount could be included

in an award in plaintiff's favor for health and medical benefits because there was no evidence that plaintiff had either purchased substitute health or medical insurance or paid any medical expenses which would have been covered by defendant's medical benefit plan. Defendant, however, did not make a specific objection to the charge and, therefore, may not assign as error the failure to give the instruction. Mazer v. Lipschutz, 327 F.2d 42, 51 (3d Cir. 1964); Harkins v. Ford Motor Co., 437 F.2d 276 (3d Cir. 1970). This is not similar to Bowley v. Stotler and Co., 751 F.2d 641 (3d Cir. 1985), because in the case at bar the court never made any comment which would entitle counsel to assume that he need not renew his objections already ruled upon.

In any event, we believe that the defendant is not entitled to relief on the merits. While the issue of recovery of

health benefits has not been addressed by the Third Circuit, and there is a split of authority among the courts which have addressed the issue, see Bonura v. Chase Manhattan Bank, N.A., 629 F.Supp. 353 (S.D.N.Y. 1986), we believe that the approach taken in Jacobsen v. Pitman-Moore, Inc., 582 F.Supp. 169 (D.Minn. 1984), is the correct method for calculating the loss of these benefits. In that case the court held: "The United States Court of Appeals for the Eighth Circuit in Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974), stated that pursuant to 29 U.S.C. §626(b), the plaintiff in an age discrimination case should recover his or her salary and other specific monetary benefits. The insurance benefits plaintiff lost are not any less of a monetary benefit to her because she could not afford to replace her insurance benefits or because she did not become

sick." Jacobsen, 582 F.Supp. at 179. See also Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983).

Finally, we note that the jury awarded the plaintiff $353,000.00, $19,500.00 of which represents an award for the loss of insurance benefits. At best, the appropriate relief would be a remittitur rather than a new trial. See generally 11 Wright and Miller, Federal Practice and Procedure §2815.

3) The defendant next argues that the court erred by not giving binding instructions to the jury that plaintiff was discharged for the legitimate non-discriminatory reason that he was unable to develop what defendant believed was the sales potential of the Allegheny County sales territory. We believe that defendant's position is meritless. Again, the defendant failed to make any objection to the charge and, therefore, waived the

right to raise the issue. Fed.R.Civ.P. 51. Second, the matter was for the jury, and as defendant concedes, the court had similar language in its charge.

4) Finally, we conclude that viewing the evidence in a light most favorable to the plaintiff there is no basis on which to grant defendant's motion for judgment n.o.v.

/s/ Gustave Diamond
United States District Judge

AGE DISCRIMINATION IN EMPLOYMENT ACT

§621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and

growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(f) Lawful practices; age and occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a

bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retire-

ment of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.